No. 294

In the Supreme Court of the United States

OCTOBER TERM, 1944

CITY BANK FARMERS TRUST COMPANY, FORMERLY KNOWN AS THE FARMERS LOAN AND TRUST COMPANY, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF HELEN HALL VAIL, DECEASED, PETITIONER

v.

GEORGE T. McGOWAN, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-EIGHTH COLLECTION DISTRICT, NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Summary of Argument	11
Argument:	
The transfers were made by the decedent in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended	14
1. The law of the State of New York attributed both the transfers and their motivating purpose to the incompetent, and the state court was authorized to make the transfers only for such purposes as it found would have motivated the incompetent herself if she had been competent	15
2. The state court was not without power to make transfers which the decedent would have made, if competent, merely because their character was such as to bring them within the ambit of the federal estate tax statute	18
3. The state court attributed to the incompetent a purpose to make a substitute for a testamentary disposition as the sole basis for the transfers made by each order	21
4. The transfers here involved, being motivated by a purpose to make a substitute for a testamentary disposition, are transfers made "in contemplation of death" within the meaning of Section 302 (c)	30
5. The transfers made by the state court were transfers made by the decedent within the meaning of Section 302 (c)	37
Conclusion	43
Appendix	44

CITATIONS

Cases:	
Boole, Estate of, 98 Cal. App. 714	34
Buck v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191	41
Burnet v. *Leininger*, 285 U. S. 136	41
Carbon Steel Co. v. *Lewellyn*, 251 U. S. 501	41
City Bank Farmers Trust Co. v. *Hoey*, 101 F. 2d 9	19

622831—44——1

Cases—Continued.

	Page
Commissioner v. *Greene*, 119 F. 2d 383, certiorari denied, 314 U. S. 641	19
Denmerich v. *Kelly*, 132 N. J. Eq. 220	34
Farmers' Loan & Trust Co. v. *Bowers*, 98 F. 2d 916, certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582	34, 39
Farmers' Loan & Trust Co. v. *Bowers*, 98 F. 2d 794, certiorari denied, 306 U. S. 648, rehearing denied, 308 U. S. 634	34
First Trust & Deposit Co. v. *Shaughnessy*, 134 F. 2d 940, certiorari denied, 320 U. S. 744	32, 34
Flagler, Matter of, 248 N. Y. 415	16
Green v. *Commissioner*, 6 B. T. A. 278	32
Griffiths v. *Frazier*, 8 Cranch. 9	16
Hamilton v. *Brown*, 161 U. S. 256	16
Hartford, In re, 122 N. J. Eq. 489, affirmed *sub nom. Hartford* v. *Martin*, 120 N. J. Law 564, affirmed, 122 N. J. Law 283	34
Heiner v. *Donnan*, 285 U. S. 312	32, 33
Helvering v. *Clifford*, 309 U. S. 331	41
Helvering v. *Hammel*, 311 U. S. 504	41
Helvering v. *Horst*, 311 U. S. 112	41
Helvering v. *Stockholms &c Bank*, 293 U. S. 84	40, 41
Helvering v. *Stock Yards Co.*, 318 U. S. 693	33
Herbert v. *Shanley Co.*, 242 U. S. 591	41
Igleheart v. *Commissioner*, 28 B. T. A. 888, affirmed, 77 F. 2d 704	32
Kroger v. *Commissioner*, C. C. A. 6th, decided December 4, 1944	32, 34
Lewis v. *Jones*, 50 Barb. 645	16
Lucas v. *Earl*, 281 U. S. 111	41
McCaughn v. *Real Estate Co.*, 297 U. S. 606	34
McDonald v. *Dewey*, 202 U. S. 510	41
Mercantile Bank v. *New York*, 121 U. S. 138	39
Milliken v. *United States*, 283 U. S. 15	40
Neal v. *Commissioner*, 16 B. T. A. 1058, affirmed, 53 F. 2d 806	32
Nichols v. *Coolidge*, 274 U. S. 531	40
Old Colony Tr. Co. v. *Commissioner*, 279 U. S. 716	41
Pauly v. *State Loan & Trust Co.*, 165 U. S. 606	41
Pressed Steel Tank Co. v. *Commissioner*, 133 F. 2d 776	41
Purvin v. *Commissioner*, 96 F. 2d 929	31
S. E. C. v. *Joiner Corp.*, 320 U. S. 344	40, 41
Sacramento Nav. Co. v. *Salz*, 273 U. S. 326	41
Scott v. *McNeal*, 154 U. S. 34	16
Sellinger's Adm'r v. *Reeves*, 292 Ky. 114	34
Tait v. *Safe Deposit & Trust Co. of Baltimore*, 74 F. 2d 851	34
Taylor v. *United States*, 3 How. 197	39
United States v. *Boston & M. R. Co.*, 279 U. S. 732	41
United States v. *Chavez*, 228 U. S. 525	41

Cases—Continued	Page
United States v. *Corbett*, 215 U. S. 233	41
United States v. *Giles*, 300 U. S. 41	41
United States v. *Graf Distilling Co.*, 208 U. S. 198	39
United States v. *Hodson*, 10 Wall. 395	39
United States v. *Katz*, 271 U. S. 354	40
United States v. *Stowell*, 133 U. S. 1	39
United States v. *Wells*, 283 U. S. 102	31, 40
Updike v. *Commissioner*, 88 F. 2d 807, certiorari denied, 301 U. S. 708	31
Whitbread, Ex Parte, 2 Mer. 99	17
White v. *United States*, 305 U. S. 281	38
Worth Bros. Co. v. *Lederer*, 251 U. S. 507	41
Statutes:	
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302	12, 30, 31, 37, 44
New York Civil Practice Act (Cahill, Seventh Ed.):	
Sec. 1356	45
Sec. 1357	45
Sec. 1383	45
Statute of 17 Edw. II	18
Miscellaneous:	
I Paul, Federal Gift and Estate Taxation (1942): Sec. 6.05, p. 251	33
Treasury Regulations 80 [as amended by T. D. 4966, 1940-1 Cum. Bull. 220], Art. 16	32

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 294

CITY BANK FARMERS TRUST COMPANY, FORMERLY KNOWN AS THE FARMERS LOAN AND TRUST COMPANY, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF HELEN HALL VAIL, DECEASED, PETITIONER

v.

GEORGE T. McGOWAN, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-EIGHTH COLLECTION DISTRICT, NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Western District of New York (R. 387–400) is reported in 43 F. Supp. 790, and the opinion of the Circuit Court of Appeals for the Second Circuit (R. 436–444) is reported in 142 F. 2d 599.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 27, 1944 (R. 444–445). The petition for a writ of certiorari was filed on July 27, 1944, and was granted on October 9, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain allowances made to the decedent's daughters and others in the decedent's lifetime out of her estate pursuant to orders of the Supreme Court of New York, the decedent having been adjudged an incompetent, are includible in her gross estate under the "contemplation of death" provision of Section 302 (c) of the Revenue Act of 1926, as amended.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*.

STATEMENT

This is a suit against the Collector of Internal Revenue for the recovery of federal estate taxes paid by the City Bank Farmers Trust Company, as administrator of the estate of Helen Hall Vail (R. 2–12), who died on December 27, 1935 (R. 74). The evidence introduced consisted entirely of ex-

hibits which, so far as material here, are as follows:

1. The record of a proceeding in the Supreme Court of New York in and for New York County, wherein, on August 11, 1926, the decedent was declared an incompetent (R. 77–95).

2. The record of a proceeding in the same court wherein, upon petition of the decedent's only living daughter, Mrs. MaBelle Houghton Plumb, dated October 8, 1926, the court, after a hearing before a referee appointed by it and upon his report, on January 14, 1927, entered an order, as prayed for, for an annual allowance of $50,000 to Mrs. Plumb out of the surplus income of the incompetent, an equal annual amount to the general guardian of the three minor children of the incompetent's deceased daughter, Laura Houghton Harris, $3,000 per year to one of the incompetent's sisters, and $2,000 per year to each of the incompetent's three remaining sisters and a brother (R. 170–174).

3. The record of a proceeding in the same court wherein, upon the further petition of Mrs. Plumb, the court, after a hearing before another referee appointed by it, and upon his report, made a further order on June 3, 1932, for additional allowances to Mrs. Plumb out of the surplus income of the incompetent, as prayed for, of $25,000 per year, payable in quarterly installments of $6,250 each, and in addition thereto the sum of $131,250, representing a payment of $25,000 per year for

the then past five years and $6,250 as the quarterly installment due March 31, 1932, of the additional allowance of $25,000 per year, and like allowances to the general guardian of the three minor sons of the decedent's deceased daughter; the order further directing that certain securities of the incompetent be sold to raise sufficient cash out of which to make payment of the allowances so ordered (R. 285–293).

The evidence taken before the referee on the first petition for allowances disclosed that the decedent had made small periodic gifts at various times to her sisters and brother, and that after the marriage of her deceased daughter in 1912 she had given to each of her two daughters an annual allowance of $1,500, increasing this in 1913 to $3,000, and in 1914 to $6,000, which sum had been paid to each annually up to 1926. In addition, the decedent had given Mrs. Plumb $1,500 at the time of the birth of the latter's son and $5,000 in 1917. The decedent had also paid $30,000 for a house for Mrs. Plumb and in 1925 she made her a gift of $5,000, making similar gifts to the decedent's deceased daughter. (R. 112, 117, 119, 121, 129, 134, 135, 138, 144–145.) No evidence was adduced as to the financial condition of Mrs. Plumb or her husband, but the father and guardian of the three minor sons of the deceased daughter testified that the appraised value of his wife's estate at her death was approximately

$50,000, which included the value of the home the decedent had given her (R. 144). The evidence further disclosed that about the time the decedent was declared incompetent her accumulated income was $757,214.25, substantially all of which had been derived from her husband's estate (R. 147), and that it required between $1,500 and $2,000 per month for her maintenance (R. 148). Furthermore, at this hearing Mrs. Plumb consented that any allowance made to her which exceeded that made to the guardian of her deceased sister's minor sons should, to the extent of the excess, be considered an advancement to her, to be charged as such against her share of the decedent's estate at the latter's death (R. 136–139).

Upon the recommendation of the referee (R. 168–169), the court made an order granting the allowances as prayed for, based upon the following findings and conclusions (R. 171–172):

> ON READING AND FILING the testimony taken at said hearing and the report of the said Referee, and it appearing to my satisfaction that the income of the said incompetent for the last four or five years has averaged over Three Hundred Thousand Dollars, and that to maintain and support the incompetent, and to care for her property, there cannot reasonably be expended a greater sum than Fifty Thousand Dollars, and that the said Helen Hall Vail has not made a last will and testament and that the said MaBelle Houghton Plumb, the

> only surviving child of said incompetent, or her issue, and the said John H. Harris, William R. Harris and David F. Harris, the three children of a deceased daughter of said incompetent, or their issue, will be, upon the death of said incompetent, the only heirs-at-law and next-of-kin of said incompetent, and the only persons entitled to share in her estate, and this Court having found and hereby finding, upon the evidence submitted before said Referee and to this Court, that if the said incompetent Helen Hall Vail were in the possession of her mental faculties and in all respects competent, she would desire that the allowance hereinafter fixed be made to the persons hereinafter designated, and would make such allowance to such persons out of her property.

The evidence taken before the referee on the second petition disclosed that the decedent's accumulated surplus income was then $1,051,078.56 (R. 207), invested in securities with a current market value of about $900,000 (R. 220); that her annual income from her husband's estate was $382,770.84 in 1931, exceeding that for 1930 of $378,016.09 (R. 258); and that in addition there was $77,412.78 income from her own estate (R. 211–212).

The only evidence as to the necessity for an increase in the allowance of $50,000 awarded to Mrs. Plumb in 1927 was that her living expenses were increasing due to the age of her son and the

fact that he was about to go to college (R. 227). As regards the necessity of an additional allowance to the three minor sons of the decedent's deceased daughter, their father and guardian testified that his married life has been characterized by a good deal of luxury; that he had travelled abroad, conducted a large house with quite a number of servants, with all of which the incompetent had been familiar; that he had never been dependent upon her for support or financial aid (R. 241–242); that the three children lived with him, and went to school, he paying their expenses and paying for other things required for their support and maintenance; and that all their moneys were invested in legal securities (R. 243). At the close of the testimony, the attorney for the petitioner, which was then acting as the committee for the decedent's property, stated, among other things, that to him the application was "not a matter of obtaining an allowance," but rather "the idea of distributing part of this incompetent's property in anticipation more or less of her death," and that he did not think the court "simply because a person is incompetent has any inherent power to give away a person's property" (R. 261–262). Furthermore, the attorney for the guardian of the three minor boys stated that he did not pretend to the referee that the $50,000 annual allowance already made was not adequate for the support and main-

tenance of the three small boys. That sum, he thought, was adequate, and he added that their father was perfectly able to take care of them and give them such education and physical comforts as they needed[1] (R. 262). He justified the allowance on the ground that the children's grandfather would wish them to have the income and that the incompetent, "if she were in sound mind would want to carry out her husband's wishes" (R. 264). He concluded: "The only theory I can stand on in this court is, I think, that the advancement is proper, and should be made under the circumstances" (Ibid.).

Upon the referee's report recommending the increase in the allowances, the court made an order therefor based upon the following findings (R. 286–287):

> ON READING the testimony taken at said Hearing from which it appears that there is accumulated income in the possession of the Committee of an inventoried value of $1,051,078.56, and whereas from the said testimony it appears that the income for the past five and one-half years has averaged about $395,000.00 a year, and the surplus income after paying all expenses, including allowances heretofore granted by the Order of January 14th, 1927, and paying all expenses, and etc. on account of the incompetent for her care and

[1] The District Court found that the father of these children had an annual gross income of $200,000 (R. 409; cf. R. 66, 67).

maintenance averaged about $191,105.18 a year, and it further appearing that said Helen Hall Vail is seventy-seven years of age and will not recover from the disease from which she is suffering and that her only issue is the petitioner, MaBelle Houghton Plumb and her son, Joseph H. Plumb, Jr., and the three infants, John H. Harris, William R. Harris and David F. Harris, children of a deceased daughter of the incompetent, and that said Helen Hall Vail has not made her Last Will and Testament, and that upon the death of the said incompetent the only persons entitled to share in her estate will be the said MaBelle Houghton Plumb the only surviving child of said incompetent and her son, Joseph H. Plumb, Jr., and the said John H. Harris, William R. Harris and David F. Harris the three children of a deceased daughter of said incompetent, or their issue * * *.

From these findings, the court concluded (R. 287)—

> that if the said incompetent, Helen Hall Vail, were in possession of her mental faculties and in all respects competent, she would desire that the allowance hereinafter fixed be made to the persons hereinafter designated, and would make such allowances to such persons out of her property, * * *.

The payments made under these orders, aggregating $1,377,866.67, were included by the Com-

missioner in the decedent's gross estate, resulting in a deficiency determination in estate taxes of $653,812.29 (R. 376–380), which was paid.

The District Court made findings regarding the facts presented to the Supreme Court of New York substantially similar to those made by that court, as well as findings concerning the nature of the proceedings in that court and of the orders made by it therein (R. 409–411). From the findings thus made, the District Court concluded that the allowances were "made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended by Section 803 (a) of the Revenue Act of 1932, now Section 811 (c) of the Internal Revenue Code" (R. 411),[2] and that upon the facts and evidence the respondent was entitled to judgment dismissing the petitioner's complaint, except that the parties had stipulated and agreed that the petitioner was entitled to judgment under the decision of the District Court (after credit for payment of additional state inheritance taxes to the States of New

[2] The District Court excepted "the sum of $6,000 paid annually to MaBelle Houghton Plumb and Ieuan Harris as General Guardian of John H. Harris, William R. Harris and David F. Harris, minor grandchildren of the incompetent, and * * * the sum of $500 paid annually to Lucy Hall Ferris", on the ground that the decedent had made similar annual gifts before becoming incompetent (see Statement, *supra*, p. 4) and hence such gifts "were motivated by the same motive which would have led the incompetent, Helen Hall Vail, to make payments in these amounts to these respective parties" (R. 399).

York and Florida, respectively) in the sum of $54,100.24, with interest (R. 416–417). The court below affirmed this judgment (R. 436–441, 444–445), Judge Swan dissenting (R. 442–444).

SUMMARY OF ARGUMENT

1. Under the law of the State of New York, the state court had no power to dispose of the incompetent's property as though she were dead; it could make only such transfers as it found she would have made if competent. In making such transfers it could not follow purposes of its own, or objectives which it deemed desirable, but was obliged to observe such considerations, moral or charitable or otherwise, as it found would have motivated her if competent. When such transfers are made by state courts, both the transfers and the motivating purpose are attributed to the incompetent.

2. Because the state court could transfer the incompetent's property only for such purposes as it found would have motivated her if competent, it was without power to effect a testamentary disposition of her property as such, and it did not do so. On the other hand, the state law does not forbid the making of allowances merely because the purpose motivating them, which the court attributed to the incompetent, would bring the transfers within the purview of the federal taxing statute. Accordingly, the state court was not prohibited by state law from making what under the federal statute

would be regarded as a substitute for a testamentary disposition, provided only that it could attribute a purpose to make such disposition to the incompetent. To do this was not to make a testamentary disposition. We know of no authority which sanctions any distinction between the types of motives which a state court may properly find would have actuated an incompetent in disposing of her property.

In any event, the orders of the state court are final, binding orders which have not been appealed nor attacked collaterally. No issue as to the scope of the state court's power is therefore now open; the sole question is whether the motive which in fact the state court attributed to the incompetent was of such a nature as to bring the transfers within the ambit of the federal estate tax.

3. In this case the records before the state court in the proceedings which led to the allowances in question supported the conclusion that the incompetent, if competent, would have desired to make a substitute for a testamentary disposition; and that was in fact the only motive attributed by the state court to her as a basis for the transfers.

4. Transfers thus made are transfers made "in contemplation of death" within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended. The purpose of the statute is to assimilate *inter vivos* gifts to testamentary dispositions whenever they are motivated by a purpose to anti-

cipate the devolution of the donor's property at his death. In this case the Commissioner concluded that the transfers were made "in contemplation of death" within the meaning of the statute; and the presumption of correctness which attaches to his determination placed upon the petitioner the burden of establishing that a positive life motive actuated the transfers, and that "contemplation of death" formed no substantial part of the motivating purpose. Here, not only did the petitioner fail to sustain this burden; the records in the proceedings in the state court, as well as the orders of that court, make clear that the only substantial purpose of the transfers was a purpose to anticipate the disposition of the incompetent's property which would have occurred on her death if she had died intestate.

5. The transfers made by the state court were transfers made by the decedent within the meaning of Section 302 (c). The contrary argument advanced by the petitioner rests upon a demand for a strictly literal construction of the statute, a construction which is not only unnecessary but inconsistent with the manifest intention of Congress. This Court has in previous cases recognized the need for flexibility in the construction and administration of the federal estate tax law, in order to prevent evasion of the tax, and should here accept as within the operation of the statute transfers which under state law were properly made by a state

622831—44——3

court on the incompetent's behalf, and for her own purposes, in contemplation of her death.

ARGUMENT

THE TRANSFERS WERE MADE BY THE DECEDENT IN CONTEMPLATION OF DEATH WITHIN THE MEANING OF SECTION 302 (C) OF THE REVENUE ACT OF 1926, AS AMENDED

The focal point of the petitioner's argument seems to be (cf. Br. 25) that, since the state court would have been without power to make a testamentary disposition of the incompetent's property, the position of the Government must amount to a contention that the orders of the state court by which the incompetent's property was transferred were beyond the court's jurisdiction. We make no such contention, either explicitly or implicitly; on the contrary, the Commissioner's determination was based on the assumption of the validity of the state court's orders, and the Government has not challenged their validity in either of the courts below and does not challenge them here. In the interest of clarity, we summarize at the outset the contentions upon which the Government's position rests. They are

(1) That the law of the State of New York attributed both the transfers and their motivating purpose to the incompetent, and authorized the state court to transfer the incompetent's property only for such purposes as it found would have motivated her if she had been competent;

(2) That although the state court would have had no authority to make a testamentary disposition, as such, of the incompetent's property, it was fully authorized to make a substitute for a testamentary disposition upon a finding that she would, if competent, herself have done so; and that in any event, since the orders of the state court are final, binding orders which have not been appealed or subjected to collateral attack, the question for consideration is not what the state court could properly have done, but what in fact it did do.

(3) That in fact the purpose attributed by the state court to the incompetent as the sole basis for the transfers was a purpose to make a substitute for a testamentary disposition;

(4) That transfers so motivated are transfers made "in contemplation of death" within the meaning of Section 302 (c);

(5) That transfers of an incompetent's property thus made by a state court are transfers made by the decedent within the meaning of the Section.

1. The law of the State of New York attributed both the transfers and their motivating purpose to the incompetent, and the state court was authorized to make the transfers only for such purposes as it found would have motivated the incompetent herself if she had been competent

There is nothing whatever in the law of the State of New York which empowers its courts to

make a transfer of an incompetent's property of their own volition, or to subserve a purpose of their own or any other purpose than they find the incompetent would wish to subserve if he were competent. State courts do not have the power to dispose of a living incompetent's property as though he were dead (*Griffiths* v. *Frazier*, 8 Cranch 9, 23; *Scott* v. *McNeal*, 154 U. S. 34, 48–49; *Hamilton* v. *Brown*, 161 U. S. 256, 267–268); and it is well settled in New York that for a state court to do more than it found the incompetent would have done, if competent, in respect of his property, would be assuming power, in effect, to make a will for him and to dictate its terms—a power which remains in him and in him alone or else is suspended or entirely extinguished. *Lewis* v. *Jones*, 50 Barb. 645, 649–650. In that case the court further pointed out (pp. 662–663) that there was nothing in the objectives of the court's authority over the estate "to sanction the idea, that either the court or the committee have anything to do with its distribution after his death."

Thus, as indicated by the petitioner (Br. 22), the Court of Appeals of New York in *Matter of Flagler*, 248 N. Y. 415, said (p. 418):

> The power of the court to dispose of her income is not plenary. The court may not be moved by its own generous impulses in the disposition of the income of the incom-

> petent. In reaching decision it may give to moral or charitable considerations only such weight as it finds that the incompetent herself would have given to them.

The power of the courts of New York to make gratuitous transfers of the incompetent's property is thus limited to the kind of transfers which they may find the incompetent would make if competent, and which spring from whatever moral or charitable considerations would dictate her decisions if she were competent, giving force and effect thereto only to the extent that she, and not the court, might feel their force. The state court is without power to regard the intent of the next of kin, or to make transfers to them independently of considerations that it finds would have dictated the incompetent's decision if she had been competent. As Lord Eldon said in *Ex parte Whitbread*, 2 Mer. 99, 102, such transfers may not be made merely because "if a Lunatic were to die to-morrow, they [the donees] would be entitled to the entire distribution of his estate"; if they are to be made, it must be "because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done."

Clearly, the New York law attributes both the transfers and their motivating purposes to the incompetent; and in the light of the historic functions and limitations of the courts in such cases

(cf. the Statute of 17 Edw. II, cited in petitioner's brief, p. 17, n. 2) no other course would, we submit, be possible.

2. The state court was not without power to make transfers which the decedent would have made, if competent, merely because their character was such as to bring them within the ambit of the federal estate tax statute

Though the state court would have been without power to transfer property of the incompetent to those who, if she should then die, would be her heirs at law, merely because in its judgment it was desirable to anticipate the transfer which would ultimately occur at her death, it by no means follows that the court could not make a transfer which, because of the nature of the motivating factor therefor which it attributed to the incompetent, would attract the federal estate tax. As we show in detail below, the record establishes that the latter was the course adopted by the state court in this case, and we believe that this course was an entirely proper one. The state court was empowered to make the transfers, from whatever motive they might have sprung, provided only that it could and did find from the records before it that the incompetent, if competent, would have been motivated by such purposes. If the incompetent would have made transfers "in contemplation of her death," within the meaning of the federal statute, it was not beyond the power of the state court to

make them on her behalf, and this power was not in the least impaired by the prohibition to make a testamentary disposition as such. As a matter of fact, the petitioner makes no distinct contention that the transfers were *per se* beyond the state court's power merely because they were of a sort which would subject them to the federal estate tax.[1]

In illustration, let us assume that, instead of increasing from $6,000 to $75,000 the annual allowances which the decedent had made to her daughters, and after the death of her daughter Laura to the latter's three boys, the court had been faced with the fact that the decedent had herself while still competent increased the allowances to $75,000, or even more, leaving herself only enough to satisfy her own requirements, and that she had done so because she was in ill health, feared that she might die at any time, and wanted besides to avoid the death tax. Could it be argued that when thereafter she became incompetent the court was powerless to accept these considerations and continue the allowances, and that it was powerless to do so merely because a purpose to make a sub-

[1] Incidentally, it is not arguable that the allowances here in question, to the extent that they were paid after the enactment of the federal gift tax statute of 1932, were not subject to the federal gift tax. In any event, they have been held to be subject thereto. *City Bank Farmers Trust Co.* v. *Hoey*, 101 F. 2d 9 (C. C. A. 2d). See also *Commissioner* v. *Greene*, 119 F. 2d 383 (C. C. A. 9th), certiorari denied, 314 U. S. 641. The petitioner does not now question the correctness of these decisions.

stitute for a testamentary disposition was not the kind of purpose which could be attributed to an incompetent, or because to do so would, perchance, attract the federal estate tax thereto? We know of no case which so distinguishes between motives, or which rests the power of the court upon the nature of the particular motive which it attributes to the incompetent. Such distinctions would vitiate the established doctrine that the power of the court turns upon no other considerations than what, in the court's judgment, the incompetent would do if competent.

Moreover, the state court clearly possessed jurisdiction of the subject matter and of the parties, and since no appeal was taken from its orders, they became final and unassailable. Even if they had been so far beyond the court's power as to be subject to collateral attack, none has been made, and none is made here. Consequently, extended argument as to the scope of the state court's power tends to obscure the basic issue before the Court, which is, not what the state court was authorized to do, but what in fact it did do. At best, the question whether what the state court did was within its power to do would be relevant only to resolve doubt as to what it did—doubt as to what purpose it in fact attributed to the incompetent. Here, as we shall presently undertake to show, there is no such doubt; the orders of the state court and the records on which they were based are consistent only with the conclusion that it attributed to the incompetent

a purpose to make a substitute for a testamentary disposition. Even if that purpose were less clearly demonstrated, its existence, being a purely factual question, should now be taken as established by the findings of the District Court, and the concurrence of the court below therein.

3. The state court attributed to the incompetent a purpose to make a substitute for a testamentary disposition as the sole basis for the transfers made by each order

The relevant principle is, of course, more strikingly illustrated by the example which we have given (*supra*, pp. 19–20) than by the situation in the case at bar. Nevertheless, the motive which the state court attributed to the incompetent is vividly outlined by the facts. Aside from a few casual gifts made on special occasions to her daughters—gifts which, considering her annual income, were surprisingly small—the incompetent had herself given to each an annual allowance of only $6,000. That was the amount of the allowance which she had made annually to each since 1914—that is, for the last 12 years of her competency—without increasing it by so much as a single dollar.[1] Yet in increasing the allowances from $6,000 to $50,000 by the first order made in 1927, and from $50,000 to $75,000 by the second order made in 1932, payable

[1] The allowances, originated at $1,500 in 1912, had been increased to $3,000 in 1913, and to $6,000 in 1914.

retroactively to 1927, the state court found that, if the incompetent were in possession of her mental faculties and in all respects competent, she would desire that the increases be made. The payments thus made to the decedent's living daughter and to the three minor children of her deceased daughter aggregated approximately $1,200,000, as against a total of about $76,000 which they would have received had their allowances been continued at the rate of $6,000 per annum. But the records in the allowance proceedings will be searched in vain for any justification for the increases other than that, assuming the decedent to be competent, she would be motivated in making the transfers by a purpose to substitute them for the distribution of her property which would occur at her death and as the result thereof. This was, in fact, the sole basis of the state court's orders increasing the allowances to the decedent's daughter and grandchildren.[5]

Thus, as a basis of the first order, the state court found that less than $50,000 was required for the maintenance of the incompetent and her property; that she had not made a last will and testament; that her living daughter, the only surviving child of the incompetent, or her issue, and the three minor children of her deceased daughter, or their issue, would upon her death be her only heirs at

[5] The basis for including in the decedent's gross estate the allowances made by the first order to the decedent's brother and sisters will be later discussed. See pp. 35–37, *infra*.

law and next of kin and the only persons entitled to share in her estate (R. 171–172). And, as a basis of the second order, the state court found that after the payment of all of the expenses on account of the incompetent's care and maintenance there remained a surplus of about $191,105.18 of her annual income; that she was then 77 years of age and would not recover from the disease from which she was suffering; that her only issue was her living daughter and the latter's son, and the three infant children of the deceased daughter; and that, since she had made no will, these persons, or their issue, would be the only persons entitled to share in her estate upon her death (R. 286–287). By contrast, there is no finding that her living daughter or grandchildren needed the increased allowances.

In this state of the record the District Court found as a fact that the gifts "were motivated by the same considerations that lead to, and were intended as, testamentary dispositions of the property and the estate of the incompetent and were transfers made in contemplation of death and in anticipation of the succession to the estate of [the] incompetent, save and except the sum of $6,000 paid annually to" her living daughter and to the guardian of the children of her deceased daughter, and except $500 paid annually to one of her sisters (R. 411).

This finding, we submit, is sustained not only by the findings of the state court in the allowance

proceedings, but as well by the records therein upon which the findings were based; and, as we have said, the court below concurred therein. The record in each proceeding in the state court is replete with uncontroverted testimony that the incompetent was incurably insane with no possible hope of recovery; that she needed for her maintenance relatively little of her annual income of $300,000 which she derived as the beneficiary under her first husband's will; that the living daughter and her son and the three minor sons of the deceased daughter and their issue were her only heirs at law and distributees and would get all of her property in any event under the laws of intestacy; and in this connection that no will had been found so that no one could possibly be prejudiced by the allowances. The record in the first state court proceeding demonstrates beyond question that the first allowance was regarded by all concerned as an advance on what the living daughter and the minor children of the deceased daughter would receive at the decedent's death (R. 138–139, 159; Referee's report, R. 164–168, 169; Order, R. 172–174). The living daughter and the guardian of the three minor children approached the court with the primary idea of "getting now" what they would "eventually get in the end." The attorney for the daughter, the petitioner in both state court proceedings, made

this clear in submitting the first petition. He said (R. 159):

> If Mrs. Vail were competent she would undoubtedly give them each a large allowance as she did while she was competent and up to within a year ago. In addition to that, Mrs. Vail's heirs-at-law, that is, her only surviving child and the guardian of the three grandsons who take the place of her deceased daughter, are perfectly willing that the allowances requested should be granted to the sisters and the brother of Mrs. Vail. Mrs. Plumb and these three grandchildren will divide between them upon Mrs. Vail's death, the whole of this estate so that the allowances cannot affect any person not interested in the estate. They are the remaindermen and they will get the whole estate divided among them upon Mrs. Vail's death.
>
> Mrs. Plumb gets the income during her life from one-half of the estate so that the granting of these allowances will only affect the persons who are applying for them and they will eventually get the property upon Mrs. Vail's death. The accumulated income here amounting to about $800,000., upon Mrs. Vail's death will be divided between Mrs. Plumb and the three grand-children.
>
> The trust fund created by the estate of Mr. Houghton will be divided in two upon Mrs. Vail's death and Mrs. Plumb will receive the income from one-half and the

> balance will be divided equally among the surviving children of Mrs. Harris, *so that by granting these allowances the child and grandchildren will be simply getting now what they will eventually get in the end,* with the exception of the small annual allowances asked for for the brother and sisters of Mrs. Vail, which they, the only persons interested in the estate are willing these sisters and brother should have. [Italics supplied.]

And the attorney for the guardian of the boys said (R. 160):

> On behalf of the General Guardian, I think his duty in the premises is to submit the interest of the children to the court for such disposition as the court may make, and as you will probably observe, it was the purport of the stipulation which was read into the record and acquiesced in, to establish an equality as between the petitioner and the children of Laura Houghton Harris, as evinced by the conduct of Mrs. Vail during her competency.

The situation is even more striking with regard to the retroactively increased annual allowances of $75,000 made on the second petition. The only justification suggested for making these on the basis of the present need of the beneficiaries was that the living daughter's son, aged 19, was about to enter college and that the allowance theretofore made to her was not sufficient to take care of the increase in maintenance expenses occasioned

thereby (R. 227). But the suggestion that such need justified the increased allowance was obviously irrelevant to the retroactive phase of the increase; it does not appear to have been taken seriously by the parties, and was in fact ignored by the state court. The attorney for the City Bank Farmers Trust Company (the petitioner here in its present capacity as administrator of the decedent's estate, but then acting as the committee of the incompetent's property) stated at the same hearing before the referee that to him the application was "not a matter of obtaining an allowance," but rather "the idea of distributing part of this incompetent's property in anticipation more or less of her death" (R. 261). In reply, the attorney for the guardian of the boys stated that he did not pretend to the referee that the annual allowances already made were not adequate for their support and maintenance (R. 262). He submitted the rights of the boys to the protection of the court, subject only to the "insistence that any allowances that are made should be measured by the equality of treatment as between the petitioner and the infant wards" (R. 269)—an insistence of course unrelated to any theory of allowances based upon need. Further replying to the objection of the committee (R. 269), the attorney for the living daughter said that, in his opinion, it was not necessary to show an actual need for the extra allowances of $25,000 per annum or for the making of the

allowances retroactive for five years. He insisted that the court had ample authority to grant the allowances if it found from the record that the probabilities were that the incompetent would grant them if competent.

The petitioner asserts (Br. 35) that remarks of counsel such as those quoted above "could not be imputed to any court in determining its motive or reason for making an order." We do not of course impute the intent of counsel to the state court; but, in determining the considerations which moved the court to enter its orders, we may with propriety examine not only the orders themselves, but the entire records upon which they were based, including the statements of the parties as to the nature of the relief sought, and the theory upon which it was based. The living daughter was the moving party in both proceedings, and throughout both proceedings primary emphasis was placed by her attorney upon the incompetent's condition, her relatively small needs, the degree of care she was receiving, the fact that she had made no will, that the living daughter and the children of the deceased daughter would at her death be the incompetent's only heirs and distributees, and that they asked to be given now, without awaiting the incompetent's death, a portion of the property in which in any event they would ultimately share. No other considerations justifying the distribution were seriously suggested, and the

court's acceptance of these considerations is made plain by its orders, for these were the only considerations mentioned in the orders of distribution (R. 171–172, 286–287) or in the reports of the referees (R. 161–169, 271–282).

But, though it is apparent that the distributions which the court ordered were intended *pro tanto* to anticipate the distribution of the incompetent's estate at her death, it is equally apparent that in ordering them the court was pursuing no purpose of its own, but one which it found would have motivated the incompetent herself if she had been competent. The orders recite with particularity "that if the said incompetent Helen Hall Vail were in the possession of her mental faculties and in all respects competent, she would desire that the allowance hereinafter fixed be made to the persons hereinafter designated, and would make such allowance to such persons out of her property" (R. 172).[6] Such language, immediately following in each instance a recital of considerations pertinent only to a death motive, can leave no doubt that the court attributed to the incompetent a motive to make distributions in anticipation of her death, and in substitution for a testamentary disposition.

[6] The quotation in the text is from the first order. Substantially identical language appears in the second order (R. 287).

4. The transfers here involved, being motivated by a purpose to make a substitute for a testamentary disposition, are transfers made "in contemplation of death" within the meaning of Section 302 (c)

The petitioner's case rests primarily on a contention that in order to bring the transfers in question under the operation of Section 302 (c) of the Revenue Act of 1926, as amended, it is necessary for the Government to ascribe to the state court an intention to make a testamentary disposition which would have been beyond its power. As we have said, we ascribe no such intention to the state court. We have endeavored to show that, though the state court would have been without power to make a testamentary disposition of the incompetent's property, it could with perfect propriety—and in this case did—order a transfer in contemplation and anticipation of the incompetent's death, upon a finding that the incompetent would herself have made such a transfer if competent; and we have pointed out that, in any event, its action in so doing is now beyond question. The only important issue now presented is whether the transfers which the state court in fact made were transfers in the nature of substitutes for testamentary dispositions. Since they were, they are within the operation of Section 302 (c), whose impact is not confined to strict testamentary dispositions. Both courts below correctly accepted our view in this respect; and we submit that the petitioner's

argument to the contrary reflects a misapprehension of the scope of the federal taxing statute.

Broadly speaking, the effect of Section 302 (c) is for estate tax purposes to assimilate to testamentary dispositions all such *inter vivos* gifts as are made with the same motives as generally lead to testamentary dispositions. Thus, in *United States* v. *Wells*, 283 U. S. 102, 116–117, it was said:

> The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Milliken* v. *United States*, *ante*, p. 15 [283 U. S. 15]. As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive. Death must be "contemplated," that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition.[7]

United States v. *Wells* is the leading case on the subject, and its doctrine has been reflected in numerous decisions of the Circuit Courts of Appeals and the Board of Tax Appeals. See, e. g., *Updike* v. *Commissioner*, 88 F. 2d 807, 810 (C. C. A. 8th), certiorari denied, 301 U. S. 708; *Purvin* v. *Commissioner*, 96 F. 2d 929, 932 (C. C. A. 7th);

[7] *United States* v. *Wells* involved Section 402 (c) of the Revenue Act of 1918, which was similar in pertinent respects to Section 302 (c) of the Revenue Act of 1926, as amended.

First Trust & Deposit Co. v. *Shaughnessy,* 134 F. 2d 940, 942 (C. C. A. 2d), certiorari denied, 320 U. S. 744; *Kroger* v. *Commissioner,* — F. 2d — (C. C. A. 6th, decided December 4, 1944); *Iglehart* v. *Commissioner,* 28 B. T. A. 888, 901, affirmed, 77 F. 2d 704 (C. C. A. 5th); *Neal* v. *Commissioner,* 16 B. T. A. 1058, affirmed, 53 F. 2d 806 (C. C. A. 8th); *Green* v. *Commissioner,* 6 B. T. A. 278, 280. Applicable Treasury regulations are in accord. See Article 16 of Treasury Regulations 80 (1937 ed.), as amended by T. D. 4966, 1940-1 Cum. Bull. 220, which provides, among other things, that—

> A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death.

It is thus clear that a transfer taking immediate effect and having all the indicia of a gift *inter vivos* may nevertheless fall within the statute if the dominant or controlling motive is to achieve a substitute for testamentary disposition. In many cases, of course, ascertainment of any single controlling motive may be beset with great practical difficulty; as Mr. Justice Stone said, dissenting in *Heiner* v. *Donnan,* 285 U. S. 312, 342:

> He [the donor of property] may not, and often does not, analyse his motives or determine for himself whether his dominat-

> ing purpose is to substitute the gift for a testamentary disposition which would subject it to the tax * * *.

With respect to transfers made by the decedent within two years prior to his death, this practical difficulty is met in part by the rebuttable presumption [8] contained in the last sentence of Section 302 (c) as amended. But even in cases where this presumption is inapplicable, the burden still lies upon the petitioner, if it would avoid the tax, to establish as a dominating purpose the existence of what may be termed a "life purpose", as distinct from a "death purpose" or purpose to effect a substitute for a testamentary disposition. For when, as here, the Commissioner in his notice of deficiency (R. 381–384) and in his rejection of claim for refund (R. 385–386) has specifically determined that the transfers in question were made in contemplation of death, the presumption of correctness which attaches to his ruling requires that the petitioner establish by a preponderance of the evidence not merely that other motives may have entered into the making of the transfers—for the statute does not confine itself to transfers made solely "in contemplation of death" [9]—but rather that a pos-

[8] Restored from earlier tax acts after the conclusive presumption originally contained in the 1926 Act was held unconstitutional in *Heiner* v. *Donnan*, 285 U. S. 312.

[9] See I Paul, Federal Estate and Gift Taxation, Sec. 6.05, p. 251, n. 4. Cf. *Helvering* v. *Stock Yards Co.*, 318 U. S. 693, 699.

itive life motive actuated the transaction and that "contemplation of death" formed no substantial part of the decedent's motivating purpose. *McCaughn* v. *Real Estate Co.*, 297 U. S. 606; *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 940, 941; *Farmers' Loan & Trust Co.* v. *Bowers*, 68 F. 2d 916 (C. C. A. 2d), certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582; *Farmers' Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794 (C. C. A. 2d), certiorari denied, 306 U. S. 648, rehearing denied, 308 U. S. 634; *Tait* v. *Safe Deposit & Trust Co. of Baltimore*, 74 F. 2d 851, 854 (C. C. A. 4th); *Kroger* v. *Commissioner*, — F. 2d — (C. C. A. 6th, decided December 4, 1944).[10] If the evidence fails to establish the absence of a substantial death motive, or at the best merely establishes a mixture of motives from which it cannot be said affirmatively that no substantial death motive actuated the transaction, then the Commissioner's determination must stand.

Here, the case for sustaining the determination of the Commissioner is, we submit, even stronger.

---

[10] Some of the cases cited in the text involved the two-year presumption; but this circumstance can have no bearing on the substantive question as to the nature and significance of the "life motive" which the claimant must in any event establish if tax is to be avoided.

The view stated in the text is likewise supported by decisions of the state courts. See, e. g., *Dommerich* v. *Kelly*, 132 N. J. Eq. 220; *Sellinger's Adm'r* v. *Reeves*, 292 Ky. 114, 119; *In re Hartford*, 122 N. J. Eq. 489, 491; affirmed *sub nom. Hartford* v. *Martin*, 120 N. J. Law 564, affirmed, 122 N. J. Law 283. See also *Estate of Boole*, 98 Cal. App. 714, 722.

Not only did the petitioner fail totally to adduce evidence supporting the existence of a life motive and the absence of a substantial death motive; the records in the state court proceedings and the findings of the state court based thereon establish affirmatively the existence of a dominating motive, attributed to the incompetent, to distribute a portion of her property during her lifetime in anticipation and contemplaton of her death, and in substitution for the devolution which would occur at her death (see pp. 21–29, *supra*). If, as a matter of law, the transfers made by the state court are properly to be regarded as transfers by the decedent within the meaning of the federal act (see pp. 37–42, *infra*), it must follow that the courts below correctly held that the Commissioner's determination was not to be disturbed.[11]

While the foregoing discussion relates primarily to the allowances made to the surviving daughter and the guardian of the three infants, similar considerations, we believe, call for affirmance of

[11] The discussion in the text is of course inapplicable to the first $6,000 of the annual allowances made to the surviving daughter and the guardian of the three infants, as well as to the first $500 of the allowance made to Lucy Hall Ferris, one of the decedent's sisters. These amounts were excluded from the gross estate by the District Court, on the ground that, representing as they did mere continuations of allowances made by the incompetent prior to her incompetency, they derived from a clearly established life motive (R. 399). The Commissioner did not appeal this aspect of the District Court's order, and no question with respect thereto is now in dispute.

the District Court's action with respect to the allowance to the brother and sisters of the decedent. These allowances concededly rest on a somewhat different basis, since the decedent's brother and sisters were not among the class of persons upon whom the incompetent's estate would in any event devolve. Except for the first $500 of the annual allowance to Lucy Hall Ferris (see footnotes 2 and 11, *supra*), the District Court included these allowances on the ground that no such allowances had theretofore been made by the incompetent prior to her incompetency, so that there was no basis for inferring the existence of a "life motive" (R. 396). While, as the Circuit Court of Appeals pointed out (R. 441), these allowances, unlike those to the daughter and grandchildren, could not have been substitutes for the devolution of the incompetent's property which would in any event have occurred upon her death intestate, they were on the other hand not shown affirmatively to have sprung from any motive disassociated from the contemplation of death. As with the allowances to the daughter and grandchildren, they involved property which was beyond any power of the donor to enjoy personally, and even beyond her individual power of disposition. Moreover, though the record in the first state court proceeding, in which these allowances were ordered, disclosed a basis for them in the need of the recipients, it failed to disclose any inclination on the

part of the incompetent, prior to her incompetency, to provide for permanent or regular alleviation of that need. While, therefore, like the Circuit Court of Appeals (R. 441), we entertain less confidence with respect to these allowances, we believe that the petitioner has failed to meet the burden of proof of establishing that the Commissioner had incorrectly determined them to have been made in contemplation of death, and that the District Court correctly included them in the decedent's gross estate.

5. The transfers made by the state court were transfers made by the decedent within the meaning of Section 302 (c)

Even assuming that the allowances in question were properly held to have been made "in contemplation of death" within the meaning of Section 302 (c), the petitioner contends that they were not transfers made by the decedent, as required by the section, for the reason that they were not made by her, but by the state court. This contention was disposed of summarily by the court below, in the following language (R. 437–438):

> The payments at bar were not made by the decedent, so that literally, the words do not apply. Nevertheless, the property was transferred, for the law gave the judges power to transfer it. The first question therefore is whether we should hold that the section covers such payments in case they are made "in contemplation of death," a

> question which we may reserve for the moment. We are satisfied that the proper construction of the section is as though it read: "any interest * * * of which at any time a transfer has been made from the decedent in contemplation of death." We have no doubt that if Congress had been faced with a situation like that before us, it would have included payments made by the court out of the property of an incompetent; to hold otherwise would be to frustrate the plain purpose of the section.[12]

We submit that this is the correct construction of the statute. The petitioner's proposed literal construction would leave these transactions in a vacuum; the purpose of the statute would fail as to them. The only justification which the petitioner suggests for thus construing the statute is the rule of thumb that taxing statutes must be strictly contrued against the Government and in favor of the taxpayer. But, as was said by this Court in *White* v. *United States*, 305 U. S. 281, 292:

> We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be

[12] It does not appear that the dissenting judge in the court below disagreed with the view of the majority on this point; his dissent is directed at the "fiction" of assuming that the incompetent could have any such "contemplation of death" as that envisaged by the taxing act (R. 442–444).

> abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be.

As a matter of fact, the rule of strict construction has never found application where to apply it would have defeated the purpose of Congress. *Taylor* v. *United States*, 3 How. 197; *United States* v. *Stowell*, 133 U. S. 1; *United States* v. *Hodson*, 10 Wall. 395; *United States* v. *Graf Distilling Co.*, 208 U. S. 198; *Farmers' Loan & Trust Co.* v. *Bowers*, 68 F. 2d 916, 923, certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582. Sight should never be lost of the fact that "The key to the proper interpretation of the act of Congress is its policy and purpose." *Mercantile Bank* v. *New York*, 121 U. S. 138, 154. Congress could not have been expected specifically to deal with this particular situation where it appears that the general language of the statute is entirely sufficient to cover it. The construction of the statute for which the petitioner contends leads to the absurd result of insulating against estate tax interests which, within the ordinary meaning of the words of the statute, are interests "of which the decedent has * * * made a transfer, * * * in contemplation of * * * his death * * *." For, ordinarily, a thing is deemed to be done by a person if it is done for him pursuant to the exercise of authority which

binds him to the consequences. Literal and restrictive construction is to be avoided if a reasonable interpretation can be given to the statute consistent with the legislative purpose. *United States* v. *Katz*, 271 U. S. 354.

Moreover, the rule of strict construction is not violated by permitting words of the statute to have their full meaning or the more extended of two meanings. The words are not to be bent, but to be taken in the sense that will best effectuate the legislative intent. *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84, 90–91; *Securities and Exchange Commission* v. *Joiner Corp.*, 320 U. S. 344. Here, the purpose of Congress in imposing the tax upon transfers at death was to prevent evasion by including all *inter vivos* transfers which, in their very nature, were mere substitutes for testamentary dispositions. Prominent among such potentially evasive transfers are outright transfers, whether in trust or otherwise, made in contemplation of the decedent's death. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Milliken v. United States*, 283 U. S. 15, 20; *United States* v. *Wells*, 283 U. S. 102, 116–117. There is no good and sufficient reason for applying a rule of strict construction here; rather, the contrary is true. The very reason for the enactment of Section 302 (c) was to avoid the consequences of a literal approach to the administration of the federal estate tax; and as this Court recognized in *United States*

v. *Wells, supra,* flexibility in construction of the section is essential if the congressional intent is to be effectuated. To the same end in many other contexts statutes have been construed to encompass things and transactions which were not within the literal meaning of their words and phrases.[12] A similar approach is entirely fitting here.

Surely no one would contend that, had the decedent herself given a general power of attorney to another to deal with the property, a transfer by such attorney made because of the imminence of the decedent's death should be held beyond the reach of the statute. Cf. *United States* v. *Giles,* 300 U. S. 41, 48–49. The petitioner (Br. 14) protests this analogy, on the ground that the basis of the state

[12] See, e. g., *Helvering* v. *Hammel,* 311 U. S. 504, where no distinction was drawn between a forced sale and a voluntary one made by the taxpayer; *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716; *United States* v. *Boston & M. R. Co.,* 279 U. S. 732; *Lucas* v. *Earl,* 281 U. S. 111; *Burnet* v. *Leininger,* 285 U. S. 136; *Helvering* v. *Clifford,* 309 U. S. 331; *Helvering* v. *Horst,* 311 U. S. 112, holding that the constructive receipt of income constitutes the receipt thereof. For other applications of the principle, see, e. g., *Helvering* v. *Stockholms &c. Bank,* 293 U. S. 84; *Herbert* v. *Shanley Co.,* 242 U. S. 591; *Buck* v. *Jewell-LaSalle Realty Co.,* 283 U. S. 191; *Sacramento Nav. Co.* v. *Salz,* 273 U. S. 326, 329; *United States* v. *Corbett,* 215 U. S. 233; *United States* v. *Giles,* 300 U. S. 41; *Securities and Exchange Commission* v. *Joiner Corp.,* 320 U. S. 344; *United States* v. *Chavez,* 228 U. S. 525; *Carbon Steel Co.* v. *Lewellyn,* 251 U. S. 501; *Worth Bros. Co.* v. *Lederer,* 251 U. S. 507; *Pauly* v. *State Loan & Trust Co.,* 165 U. S. 606; *McDonald* v. *Dewey,* 202 U. S. 510; *Pressed Steel Tank Co.* v. *Commissioner,* 133 F. 2d 776 (C. C. A. 7th).

court's power to dispose of the incompetent's property is not contractual, and does not derive from the incompetent, but flows directly from the sovereign. This, we submit, is a distinction without a difference. The vital thing is the result of the exercise of the power and not the method by which it was created. The power is inherent in the court only because of the law which vests it in the court. In a very real sense, the law constitutes the courts the agents of the incompetent, for they are empowered to act for him and to do only those things which he could and would have done in respect of his property had he remained competent. In the exercise of such powers the courts are not in any sense arbiters of the rights of contending parties, but conservators of the incompetent's property. As such, they stand in the shoes of the incompetent no less than does the attorney in fact. The question is not how the court acquired the power to make transfers of the incompetent's property, but whether the exercise of that power accomplished the sort of transfer which Congress intended to tax. Since it did, the fact that it was accomplished through the instrumentality of the court, rather than through an attorney in fact, is of no consequence.

We therefore submit that no violence is done to the "contemplation of death" provision of the statute by so construing it as to bring the transfers here within its ambit.

CONCLUSION

For the reasons stated the decision of the court below should be affirmed.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
CARLTON FOX,
CHESTER T. LANE,
Special Assistants to the Attorney General.

DECEMBER, 1944.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Sec. 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States.

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) [as amended by Sec. 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of

a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

New York Civil Practice Act (Cahill, Seventh Edition):

SEC. 1356. *Jurisdiction of supreme court; concurrent jurisdiction of county court.* The jurisdiction of the supreme court extends to the custody of the person and the care of the property of a person incompetent to manage himself or his affairs in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding, or other cause. Where a county court has jurisdiction of those matters, concurrent with that of the supreme court, the jurisdiction of the court first exercising it, as prescribed in this article, is exclusive of that of the others with respect to any matter within its jurisdiction for which provision is made in this article. (Code Sec. 2320, in part.)

SEC. 1357. *Duty of court having jurisdiction.* The court exercising jurisdiction over the property of either of the incompetent persons, specified in the last section, must preserve his property from waste or destruction; and, out of the proceeds thereof, must provide for the payment of his debts and for the safe keeping and maintenance, and the education, when required, of the incompetent person and his family. (Code Sec. 2321.)

SEC. 1383. *Death of incompetent; duty of committee.* Where a person, of whose property a committee has been appointed, as prescribed in this article, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of as if a committee had not been appointed. The committee, in such case, shall render to the court by which he was appointed a final account of his proceedings touching the property of the incompetent. Notice of the application for settlement of such account shall be given, in such manner as the court may direct, to the sureties on the official bond of the committee or the legal representatives of such sureties, and to the executor or administrator of the decedent, if any; and if there be no executor or administrator, to the decedent's husband or wife, and heirs and next of kin, or if any of those persons shall have died, to his executor or administrator. (As amended by L. 1935, ch. 724, September 1. Code Sec. 2344, in part.)

U. S. GOVERNMENT PRINTING OFFICE : 1944

SUPREME COURT OF THE UNITED STATES.

No. 294.—October Term, 1944.

City Bank Farmers Trust Company, formerly known as The Farmers Loan and Trust Company, as Administrator, etc., Petitioner, vs. George T. McGowan, Collector of Internal Revenue for the Twenty-eighth Collection District, New York.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 29, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

This case presents an issue of importance arising under § 302(c) of the Revenue Act of 1926, as amended,[1] which requires inclusion, in the gross taxable estate of a decedent, of any interest in property of which the "decedent has at any time made a transfer . . . in contemplation of . . . his death, ..." More specifically, the inquiry is whether the section reaches allowances out of the income of an incompetent person.

Helen Hall Vail died in 1935 intestate. For nine years she had been incurably insane. In 1926 an adjudication of incompetency was entered by the Supreme Court of the State of New York, and a committee was appointed to care for her property, which consisted of income-producing realty and personalty. In addition, she was in receipt of the income of a trust. During the period of five years prior to the adjudication her annual income from all sources had averaged $300,000. She was over 70 years of age but in good physical health. She had a living daughter and three grandsons, children of a deceased daughter. Application was made to the court to make allowances out of income to Mrs. Vail's issue and to a brother and sisters. The court referred the matter to a referee before whom it was shown that she had, over a period of years, allowed each of her daughters $6,000, and one of her sisters $500, per annum, and had made gifts to her

[1] Internal Revenue Code § 811(c), 26 U. S. C. § 811(c).

daughters, but not with regularity. As she was confined in an institution, her total needs, including maintenance and taxes, did not exceed $50,000 per annum. Accumulated income in the hands of the committee amounted to over $750,000.

The court, on the basis of the referee's report, entered an order which, after reciting that Mrs. Vail had made no will, that the daughter and grandchildren, or their issue, would, upon her death, be her only heirs at law and next of kin, and the only persons entitled to share in her estate, and that, if she were in possession of her mental faculties, "she would desire that the allowance hereinafter fixed be made . . ., and would make such allowance to such persons out of her property", directed the committee to pay yearly, in quarterly installments, $50,000 to the living daughter and $50,000 to the guardian of the children of the deceased daughter; $2,000 each to all but one of the brother and sisters; and $3,000 to the remaining sister.

Some six years later an application was made for an increase in the allowance. The matter was again referred for hearing and, on the coming in of the referee's report showing that accumulated income in Mrs. Vail's account had increased to over $1,000,000, that income had averaged, for over five years, approximately $395,000 per annum, and, after paying allowances and all expenses, the surplus averaged about $191,000 a year, the court made an order reciting that she was then 77 years of age and incurable, enumerated the issue who would be entitled to her estate at death, that she had no will, and that if she were competent she would have desired that the sums named in the earlier decree be augmented, raised the allowances to the daughters and to the grandchildren collectively to $75,000, retroactive to the date of the original order. It was never claimed, and is not contended, that the next of kin needed any such allowances for their maintenance and support in their station in life. It is conceded that the brother and sisters to whom allowances were made were destitute and in need of maintenance.

At Mrs. Vail's death the allowances theretofore paid totaled $1,377,866.67. The Commissioner of Internal Revenue included the sum in the decedent's gross estate and determined a deficiency. The petitioner, as administrator, paid the sum demanded, claimed a refund and, on denial, instituted this action in the District Court. That court, upon consideration of the record of the pro-

ceedings in the Supreme Court of New York, found that the total of the allowances was properly included in the decedent's gross estate, except so much as represented annual payments to the daughter and the grandchildren's guardian of $6,000 each and $500 per annum of the gifts to collaterals, and entered judgment accordingly.[2] The Circuit Court of Appeals, by a divided court, affirmed the judgment.[3] We granted certiorari.

The Supreme Court of New York is empowered by statute to act as representative of the State, as *parens patriae*, in caring for the persons and the estates of its incompetent citizens. That court may grant allowances out of income only if it determines that the incompetent would probably have granted such allowances himself had he been sane. The court does not, in any proper sense, act as the incompetent's agent. In the exercise of the power the primary consideration is that the incompetent's property shall not be wasted but preserved against the possibility of restoration to sanity. On these propositions the parties are in accord.

The petitioner urges that the present case is not within the terms of the statute and that, in enacting § 302, Congress did not contemplate any such contingency as that here involved. It insists that Mrs. Vail made no transfer but, if any was made, the court made it; that she had and could have no motive in respect of the gift. In addition, it urges that, under the State law, the court's control over the estate ceases at the incompetent's death, and the court cannot make a will for her or in any wise interfere with the devolution of her estate. Hence, it concludes that to suggest the court sanctioned transfers of a testamentary character is to assume that it exceeded its powers. Such an assumption, so petitioner says, ought not to be indulged. On the contrary, it should be presumed that the court acted within its granted powers; that is, authorized transfers *inter vivos*, with no testamentary motive.

The Government, on the other hand, takes the position that nothing in the law of New York, and no authority cited by the petitioner, precludes the State court from making an allowance in contemplation of death if, upon the record made, the court, placing itself in the incompetent's position on the supposition that she were sane and competent, concludes that she would have made

[2] 43 F. Supp. 790.

[3] 142 F. 2d 599.

the transfers. And, it adds, that what was done by the Supreme Court in this case was not appealed and is now beyond correction, if erroneous, and that the records and orders evince an understanding that the certainty of continuance of disability until death, the fact of intestacy, and the natural expectations of the distributees under the intestate laws were prevalent factors in moving the court to make the orders in question, and characterize the court's action as taken in contemplation of death. The Government says that, as the court was required to, and did, act as the decedent would have acted if competent, this case is not outside the terms of § 302(c) but, on the contrary, in contemplation of law, the decedent did make the transfers in question.

The issue is a narrow one. Literally Mrs. Vail neither made the transfers nor did she have any motive with respect to them. But a court stood in her place and unquestionably had the function of effectuating a transfer of her property and of determining what motive or purpose would have actuated her had she been competent to act. It seems to us that it is sticking in the bark to say that, in the circumstances, the transfers are not within the section because Congress did not add a phrase to the effect that where a court made the transfer, acting in lieu of the incompetent owner, such a transfer should be governed by the statute.

We hold, therefore, that where, as in New York, the court is to substitute itself as nearly as may be for the incompetent, and to act upon the same motives and considerations as would have moved her, the transfer is, in legal effect, her act and the motive is hers.

This being so, the only remaining question is whether the proof was sufficient to overcome the presumption arising from the Commissioner's determination that the transfers were made in contemplation of death. The applicable test is that stated in *United States* v. *Wells*, 283 U. S. 102. This is whether the thought of death is the impelling cause of the transfer. As respects the descendants of Mrs. Vail, it would seem clear enough that there was no dominant motive for the transfer other than the thought that, as they would inherit her estate, and as there was a large accumulation of unneeded income, they might as well receive substantial portions now as await her death to enjoy their inheritance. The fact that these beneficiaries did not stand in need of the money, the fact that the increase granted at the

second hearing was made retroactive, and that the past instalments were paid in a lump sum, the arguments of counsel in both hearings that the only reason for granting the allowances to Mrs. Vail's descendants was that they inevitably would divide her estate amongst them, and the recitals of the court orders, to which reference has been made, all go to confirm, rather than to undermine the Commissioner's determination.

We think the District Court was right in holding that, to the extent of $6,000 per annum, which was the sum Mrs. Vail, when competent, had regularly allowed each of her daughters, the transfers fall without the terms of § 302(c), but that the balance of the payments to her descendants falls within its sweep.

A different question is presented respecting the allowances to collaterals. It appears that they were in need of funds for their maintenance and support, and it is obvious that no payments to them could be on account of any share of their sister's intestate estate. The allowances have the color of current payments for support and they were authorized because the court concluded that, if sane and cognizant of the situation, Mrs. Vail would have made them. These considerations lead to the conclusion that the Commissioner's determination concerning them is rebutted and that they should not have been included in the decedent's gross estate. To the extent indicated the judgment of the Circuit Court of Appeals is reversed.

So ordered.